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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil Action No. 507

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

JURISDICTIONAL STATEMENT BY PLAINTIFF UNDER RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

[Stamp:] Filed Sep. 1, 1944. Clerk, U. S. Dist Court

Plaintiff respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. Statutory Provisions

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Was Presented.

The decree sought to be reviewed was entered on July 21, 1944. The petition for appeal was presented and allowed on 9-27-44, together with an assignment of errors.

C. Nature of Cause and of Rulings Below

This is an appeal from a final decree of the District Court of the United States for the Western District of North Carolina, Asheville Division, entered July 21, 1944. By said decree the Court ordered, adjudged, and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed. By the said suit plaintiff had prayed the Court to restrain, enjoin, and suspend the operation, execution, and the effect and enforcement of an order of the Interstate Commerce Commission (Division 5), entered October 13, 1943, in its joint report

(mimeographed—not to be printed in full in the permanent series of motor-carrier reports of the Interstate Commerce Commission) in the proceedings entitled No. MC-14486 (Sub-No. 9), *McDuff Turner—Extension—Augusta, Ga.*, and No. MC-61598 (Sub-No. 9); *Smoky Mountain Stages, Inc.—Extension—Augusta, Ga.*, by the terms of which the Interstate Commerce Commission denied the application of this plaintiff for a certificate of public convenience and necessity authorizing the transportation, in interstate or foreign commerce, of passengers and their baggage, and of express, mail, and newspapers, over a described route between Clinton, S. C., and Augusta, Ga., and by the further terms of which the said Interstate Commerce Commission authorized issuance of a certificate of public convenience and necessity to Smoky Mountain Stages, Inc., to engage in the transportation, in interstate or foreign commerce, of passengers and their baggage, and of express, mail, and newspapers, between Clinton, S. C., and Augusta, Ga., over that same route.

Following the issuance of the said report of the Interstate Commerce Commission (Division 5), plaintiff filed its petition, dated November 24, 1943, praying that the entire membership of the Interstate Commerce Commission grant reconsideration, oral argument, or further hearing. The said petition was denied by the Interstate Commerce Commission on March 6, 1944, although in the meantime the effective date of the aforesaid order of the Commission was postponed from time to time. On August 9, 1944, the effective date of the order and the issuance of a certificate to Smoky Mountain Stages, Inc., were stayed by the Interstate Commerce Commission until August 28, 1944, pending the outcome of plaintiff's petition in the said District Court of the United States for the Western District of

North Carolina, Asheville Division, for a stay of the said order of the Interstate Commerce Commission and for stay of the issuance of a certificate of public convenience and necessity to Smoky Mountain Stages, Inc.

The principal grounds stated in the complaint in this Court are (a) that the Interstate Commerce Commission acted arbitrarily and capriciously, in excess of its statutory power, and contrary to the indisputable character of the evidence, in according to Smoky Mountain Stages, Inc., the operating rights sought, and (b) that the Interstate Commerce Commission acted contrary to the law in basing its decision on the record made before a Joint Board which was unlawfully constituted under the statute. The first of the two grounds is predicated principally upon the following errors of the Interstate Commerce Commission: (1) Its failure to find that there is no need for local passenger service over the proposed route in addition to that now adequately supplied by plaintiff or by other operators already in the field; (2) its finding that public convenience and necessity require operation over the proposed route as a "bridge" route between north Atlantic States and Florida; (3) its failure to take proper cognizance of the adverse effect of the proposed new operation on the existing operation of plaintiff; and (4) its failure to consider the condition of the proposed new route, particularly in relation to its contemplated use as part of a regular north-south highway.

The decision of the lower Court, if allowed to stand, would seem to establish the principle that findings by the Interstate Commerce Commission, merely because couched in the language of the statute, are sufficient in the absence of supporting findings of fact based upon evidence of

record. This is directly contrary to well-recognized principles of judicial review. *Florida* v. *United States*, 282 U. S. 194. Accordingly, it is important that this decision be reviewed.

D. Cases Sustaining the Jurisdiction of the Supreme Court of the United States on Appeal

Board of Trade of Kansas City v. *United States*, 314 U. S. 534.

Union Stock Yard Co. v. *United States*, 308 U. S. 213.

United States v. *Pan American Petroleum Corp.*, 304 U. S. 156.

United States v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454.

Mississippi Valley Barge Co. v. *United States*, 292 U. S. 282.

Florida v. *United States*, 292 U. S. 1.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420.

Assigned Car Cases, 274 U. S. 564.

Virginian Ry. v. *United States*, 272 U. S. 658.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268.

Texas & Pacific Ry. Co. v. *United States*, 162 U. S. 197.

McDonald v. *Thompson*, 305 U. S. 263.

United States v. *Maher*, 307 U. S. 148.

E. Decree and Opinion of the District Court

Appended to this statement are copies of the opinion, findings of fact, conclusions of law, and final decree of the District Court.

Plaintiff, therefore, respectfully submits that the Supreme Court of the United States has jurisdiction of the appeal.

MONROE M. REDDEN,
Hendersonville, N. C.,
WILMER A. HILL,
238-241 Transportation Building,
Washington 6, D. C.,
Attorneys for Plaintiff.

APPENDIX A

[Stamp:] Filed July 21, 1944. Clerk, U. S. Dist. Court

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil No. 507

CAROLINA SCENIC COACH LINES, a co-partnership, *Plaintiff*,

versus

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

On Application for Injunction

(Argued July 10, 1944. Decided July 21, 1944)

Before Parker, Circuit Judge, and Webb and Hayes, District Judges

Monroe M. Redden, Wilmer A. Hill and Ames, Hill & Ames, for Carolina Scenic Coach Lines; Roberts & McInnis, James E. Wilson, Cherry & Hollowell and Edgar Turlington, for Smoky Mountain Stages, Inc.; Edward Dumbauld, Special Assistant to the Attorney General, Wendell Berge, Assistant Attorney General, and Theron L. Caudle, United States Attorney, for United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commision, and Allen Crenshaw, Attorney, Interstate Commerce Commission, for Interstate Commerce Commission.

PARKER, *Circuit Judge:*

This a suit under 28 U. S. C. A. 43-48 to set aside and enjoin an order of the Interstate Commerce Commission granting to Smoky Mountain Stages, Inc., hereafter referred to as "Stages", a certificate of public convenience and necessity, extending its authority as a public carrier of passengers by motor bus so as to authorize it to operate over a certain route between Clinton, S. C., and

Augusta, Ga. By the same order, the application of plaintiff, Carolina Scenic Coach Lines, hereafter referred to as "Scenic", for a certificate authorizing operation over the same route was denied. A special court of three judges has been convened pursuant to statute to hear the application for interlocutory injunction, the case has been heard upon the pleadings, the record made before the Commission and the briefs and arguments of counsel, and by consent of parties the cause has been submitted upon the merits for final decree.

Stages is associated with National Trailways system. It made application for the certificate authorizing operation between Clinton and Augusta, so as to close the link in the Trailways Line between the north and Florida points and to enable Trailways to compete with the Greyhound lines for this traffic. Scenic had been operating between Clinton and Augusta over a route slightly different for a portion of the way; but it was not associated with Trailways or with any other line which could adequately handle this traffic between the north and Florida points. When Stages filed its application, Scenic opposed it and filed application for a certificate over the same route, which Stages opposed. The Atlantic Greyhound Corporation also opposed the application of Stages. The Commission referred both applications, under sec. 205(a) of the Interstate Commerce Act, 49 U. S. C. A. 305(a), to a Joint Board of two members, one from each of the States of South Carolina and Georgia, the States through which the proposed route ran. The Joint Board heard evidence and made a report recommending that the application of Stages be granted and that of Scenic be denied. The matter then came on for hearing before Division 5 of the Commission, which made a thorough analysis of the evidence and wrote its own report, granting the application of Stages and denying that of Scenic. Appeal from this decision was taken to the entire Commission, in accordance with its rules, by petition which the Commission denied, thereby affirming the action of the Division.

It is clear from the record that the local traffic between Clinton and Augusta is a matter of little or no consequence

to either of the parties and that the applications here under consideration were made because of the importance of the North and South bridge traffic. Concerning this the Commission made the following statement in its report, which is amply sustained by the evidence before it:

> "At present Trailways has no system of through routes between points in eastern seaboard states and Florida. Persons desiring to travel by bus between such points are virtually dependent upon Greyhound which operates the so-called coast route. Traffic which Trailways' members originates at points on their routes north of Charlotte is transferred at that point to Greyhound, which completes the transportation through the Jacksonville gateway. Northbound traffic originating on the Greyhound Lines in Florida generally is not transferred to Trailways' members, Greyhound performing the entire transportation over its lines through Richmond, Washington, Baltimore, and points north. Thus Trailways' members participating in the transportation of Florida southbound traffic are practically excluded from obtaining Florida northbound traffic. If Stages' application is granted the last link in a chain of through routes of Trailways' members between northern points and Florida will be completed. In addition, the routes of Trailways' members run through west coast Florida points, providing a more direct service to and from such points than that rendered by Greyhound through the Jacksonville gateway. Aside from the direct benefit to the public in having available additional through motor bus facilities to and from Florida points, Trailways' members will be in a position to stimulate potential Florida traffic at points along their routes, resulting in increased revenue to them. Any detriment which Greyhound might suffer by reason of the establishment of another system of through routes is outweighed by the benefit to the public. Having concluded that there is a need for another through north-south service, there remains for consideration whether Scenic and Carolina Stages can accomplish the same

result over their present joint routes between Charlotte and Augusta.

"Scenic has been operating between Clintin and Augusta for many years, and also has available by reason of its connection with Carolina Stages a through route between Charlotte and Augusta, via Union, Newberry, and Saluda. It was not, however, until two weeks prior to the hearing herein that convenient connections and a more expeditious service between Charlotte and Augusta was instituted. The maintenance of a coordinated system of independent carriers, such as Trailways, requires cooperation and friendly relations between the various members. The inability in the past of Scenic and Carolina Stages and Trailways to reach a satisfactory agreement as to the placing of these carriers routes in the Trailways' system appears to have been the delaying factor in the establishment of the through route between Charlotte and Augusta and the cause of the filing of Stages' application. It is not indicated that future relations will be more harmonious.

"The granting of Stages' application will place it in a competitive situation with Scenic and Carolina Stages between Charlotte and Augusta and with Scenic between Clinton and Augusta. There is no showing, however, that any substantial traffic now is moving over the combined routes of Scenic and Carolina Stages between Charlotte and Augusta, and it is apparent that relatively little, if any, Florida traffic is handled over these routes. While Scenic has been operating between Clinton and Augusta for a long period of time serving most of the cities and towns on the proposed route, the latter route traverses 63.5 miles of highways not served by Scenic. Persons located on a large portion of such highways have no direct service to or from Clinton, Charlotte, or Augusta; and on 40.7 miles there is no bus service available.

"Stages anticipates that most of the traffic which it will transport over the proposed route will be 'bridge'

traffic, but it also wishes to be in a position to transport passengers traveling between points on the proposed route and points on the routes of Trailways' members. There is no evidence as to the amount, if any, of 'bridge' traffic which Scenic transports over its present route between Clinton and Augusta or the number of passengers moving between points on such route and points beyond. Scenic shows, however, that in April, 1941, it carried, on three schedules daily, 211 passengers from Clinton and points south thereof to Augusta, or an average of 2 passengers daily per schedule. It is clear, therefore, that the interstate traffic moving to or from points on such route provides only a small part of its revenue. While a portion of such traffic may be diverted to Stages if the latter's application is granted, any loss of traffic to Scenic would not be a sufficient reason to warrant a denial of Stages' application, when consideration is given to the benefit to be derived by the general public by having available the through routes between New York City and Florida points and points intermediate thereto. We believe that the best interests of the public will be served by granting Stages' application and denying that of Scenic."

We think there can be no question but that on these facts the order of the Commission was amply supported. What public convenience and necessity require in the premises is a matter which Congress has confided to the judgment of the Commission, and not of the courts, to determine. *C. & O. R. Co.* v. *United States* 283 U. S. 35, 41; *Board of Trade of Kansas City* v. *United States* 314 U. S. 539, 546; *United States* v. *Carolina Freight Carriers Corp.* 315 U. S. 475, 482, 490; *Bush Transfer, Inc.* v. *United States* 53 F. Supp. 640; *Virginia Stage Lines* v. *United States* 48 F. Supp. 79. And courts in reviewing orders made by the Commission in the exercise of the discretion reposed in it by Congress may not substitute their judgment for that of the Commission, nor may they set aside the orders unless they are made without substantial

evidence to support them, involve error of law or are so manifestly arbitrary and unreasonable as to transcend the power conferred by statute. The well settled rule was thus stated by this Court in the recent case of *Bondurant* v. *United States* 50 F. Supp. 704, 706:

> "We cannot say that the Commission's findings are not supported by the evidence, that they involve any error of law or that they are so arbitrary or unreasonable as to amount to an abuse of discretion. This being true, the relief prayed for must be denied. 'This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it'. Virginian Ry. *v.* United States 272 U. S. 658, 665, 666, 47 S. Ct. 222, 225, 71 L. Ed. 463; Interstate Commerce Commission *v.* Union Pac. R. Co., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

See also the statement of the rule by another three-judge court of this Circuit in Anchor Coal Co. *v.* United States 25 F. 2d 462, 471, as follows:

> "If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the Commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law. Chicago, R. I & Pac. Ry. *v.* U. S., 274 U. S. 29, 33, 47 S. Ct. 486, 71 L. Ed. 911; Virginian Ry. Co. *v.* U. S., 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463; Western Paper Makers' Chem. Co. *v.* U. S., 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action. Southern Pac. Co. *v.* I. C. C. 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; I. C. C. *v.*

> Union Pac. Co., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308; U. S. *v.* N. Y. C. R. R., 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470; U. S. *v.* New River Co., 265 U. S. 533, 540, 44 S. Ct. 610, 68 L. Ed. 1165."

In the *Virginia Stages* case, supra, 48 F. Supp. 79, 83, which was much like this in that it involved a decision as to which of two competing bus lines was to have operating rights over a certain route, Judge Dobie stated the rule as follows:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. Alton Railroad Company *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; Gray *v.* Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' Board of Trade of Kansas City *v.* United States, 1942, 314 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432."

Scenic questions the validity of the order because there was an order of reference to the local board composed of members from the States of Georgia and South Carolina, but we see nothing in the point. The proposed route over which the certificate of convenience and necessity was asked ran through the States of Georgia and South Carolina; and the statute expressly provides for reference to such a board when "operations proposed to be conducted involved not more than three states". 49 U. S. C. A. 305(a). The fact that the bridge traffic would bring passengers from other states is immaterial, since the controlling consideration is the "operations proposed." But

even if there had been error in the matter, the record does not show that Scenic raised any objection thereto either before the Board or before the Commission, and it is too late to object for the first time in this Court. Furthermore, if objection had been made and sustained, the result would have been merely to give the Commission discretion whether to refer the matter to a Board for hearing or to hear it itself; and, since the Commission has heard the matter at large and filed an opinion giving its independent judgment on the case, it is not possible to see how Scenic has been hurt by the hearing before the Board, even if that hearing was not appropriate in the premises. Empire Trails *v.* United States 53 F. Supp. 373; North Coast Trans. Co. *v.* United States 54 F. Supp. 448.

For the reasons stated the injunction will be denied and the suit will be dismissed.

Injunction Denied and Suit Dismissed.

JOHN J. PARKER,
United States Circuit Judge,
Fourth Circuit.

E. Y. WEBB,
United States District Judge, Western
District of North Carolina.

JOHNSON J. HAYES,
United States District Judge, Middle
District of North Carolina.

Office - Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 637.

CAROLINA SCENIC COACH LINES, a Co-partnership,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF IN BEHALF OF APPELLANT OPPOSING MOTION BY APPELLEES TO AFFIRM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA (ASHEVILLE DIVISION) AND OPPOSING MOTION BY SMOKY MOUNTAIN STAGES, INC., INTERVENER-APPELLEE, TO AFFIRM THE SAID DECREE OR DISMISS THE APPEAL.

CAROLINA SCENIC COACH LINES,
Appellant.

By WILMER A. HILL,
Its Attorney.

Of Counsel:
MONROE M. REDDEN,
Hendersonville, N. C.

AMES, HILL & AMES,
Transportation Building,
Washington 6, D. C.

Dated at
238-241 Transportation Building,
Washington 6, D. C.,
November 17, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 637.

CAROLINA SCENIC COACH LINES, a Co-partnership,
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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF IN BEHALF OF APPELLANT OPPOSING MOTION BY APPELLEES TO AFFIRM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA (ASHEVILLE DIVISION) AND OPPOSING MOTION BY SMOKY MOUNTAIN STAGES, INC., INTERVENER-APPELLEE, TO AFFIRM THE SAID DECREE OR DISMISS THE APPEAL.

Pursuant to paragraph 3 of Rule 7 of the Revised Rules of the Supreme Court of the United States, comes now appellant, Carolina Scenic Coach Lines, and files this its brief opposing the motion of appellees to affirm the decree of the specially constituted District Court of three Judges[1] and also opposing the motion of Smoky Mountain Stages,

[1] The said motion of the appellees was filed in the District Court of the United States for the Western District of North Carolina (Asheville Division) in Civil Action No. 507 and was served on appellant on October 31, 1944.

Inc., intervener-appellee, hereinafter called Stages, that the said decree[2] be affirmed or the appeal dismissed.

I.

The facts in respect to the merits of the cause and of the appeal are adequately set forth in the appeal itself, and, therefore, the instant opposing brief does not deal with that subject. This Brief stems, instead, from two mistaken assertions by Stages[3] which bear directly on jurisdictional features of the proceeding, namely,

(a) that the "presentation of the order allowing the appeal to the District Court was held in a state of suspense at the request of counsel for appellant pending final determination by its counsel as to whether they would perfect the appeal" (page 2 of motion by Stages); and

(b) that "Washington counsel for appellant (sic) have not to date been served with a copy of the petition for an order allowing the appeal," etc., and that "Appellee (sic) has accordingly violated paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States," etc. (page 3 of motion by Stages).

II.

We turn first to the statement by Stages that the presentation of the order allowing the appeal was held in a state of suspense at the request of counsel for appellant. In this, Stages is in error. The appeal papers were properly filed in the said District Court on September 1, 1944, and at no

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[2] The said motion of Stages was filed in the District Court of the United States for the Western District of North Carolina (Asheville Division) in Civil Action No. 507 and was served on appellant on October 30, 1944.

[3] The motion by appellees, at page 2 thereof, refers only casually to the first of the two assertions by Stages to which this brief in opposition is directed; our discussion hereinafter will deal solely with the motion by Stages.

time was there a request by counsel for appellant that action on the appeal be deferred. Subsequently to the filing of the appeal in the said District Court, the Clerk of that Court expressed some doubt concerning the appropriate method for handling on his part, and there followed conversations and written communications between the Clerk and one of counsel for appellants, but we repeat that neither of said counsel sought any suspension of action. On and after September 1, 1944, the said appeal was uninterruptedly on file in the said District Court and was at all times awaiting allowance. In explanation of Stages' misunderstanding, it should perhaps be added that at one time (on or about September 19, 1944) informal inquiry was made of the Clerk whether transmission of the appeal papers to the United States Supreme Court could await the outcome of appellant's petition (then pending before the Interstate Commerce Commission) for a further hearing before that Commission based on newly discovered evidence, by the granting of which petition the Court proceedings would have become moot, but it should also be reiterated that there was no request by counsel for suspension of action by the Clerk or by the District Court.

III.

At pages 2 and 3 of the motion by Stages appears the following:

> "In its October term, 1942, the Supreme Court amended its rules as follows:
>
> 'An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the Judge or Justice who allows it. A prior timely application to another Judge or Justice does not extend the statutory period. See Matton Steamboat Company v. Murphy, 319 U. S. 412'.
>
> It seems clear the appellants have failed to comply with the provisions of the statute requiring the perfection of an appeal within sixty days from the date of

the entry of the final order or decree. The appeal should be dismissed."

The case cited is patently not here in point. In *Matton Steamboat Company* v. *Murphy,* 319 U. S. 412, the applicable statute provided that "no appeal • • • intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree." Appellant there made timely application for allowance of its appeal to the Chief Judge of the New York Court of Appeals, "who, being in doubt as to the finality of the judgments, denied the applications shortly before the expiration of the three months period." Appellant took no further action to perfect its appeal *within the three months period,* and the United States Supreme Court concluded that "appellants' applications for allowance of the appeals, after the expiration of the three months period, were too late, and that this Court is without jurisdiction to entertain the appeals, which are accordingly dismissed."

In the instant case the Court will observe, as stated in paragraph II herein above, that the appeal was timely and was pending at all times during the sixty-day period provided by statute; and it accordingly seems necessary to do no more than direct the attention of the Court to its observation in *Matton Steamboat Company* v. *Murphy, supra,* that "appellants' applications to the Chief Judge of the Court of Appeals were timely, and could have been allowed by him either before or after the expiration of the three months period." The appeal here was in fact allowed some six days after the expiration of the sixty-day period.

IV.

This brings us to the assertion by Stages that its *Washington* counsel were not served with a copy of the assignments of error, etc. The fact is, however, as the records

of the District Court will readily disclose, that the service in question was made on R. Gregg Cherry, Esquire, with offices in Gastonia, N. C., who was one of counsel of record for Stages. Thus there was a full compliance with paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States. Stages is here obviously in error.

V.

WHEREFORE, appellant prays that the respective motions of the appellees and of Stages be disallowed and that the said decree of the District Court be reversed.

Respectfully submitted,

CAROLINA SCENIC COACH LINES,
Appellant.
By WILMER A. HILL,
Its Attorney.

Of Counsel:

MONROE M. REDDEN,
Hendersonville, N. C.

AMES, HILL & AMES,
Transportation Building,
Washington 6, D. C.

Dated at
238-241 Transportation Building,
Washington 6, D. C.,
November 17, 1944.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day made service of the foregoing document upon each of the following named counsel for appellees and for Smoky Mountain Stages, Inc., intervener-appellee, by mailing to each of said counsel a copy thereof by first-class mail:

Charles Fahy, Esquire,
Solicitor General,
Department of Justice,
Washington, D. C.

Daniel W. Knowlton, Esquire.
Chief Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

William A. Roberts, Esquire,
Roberts & McInnis,
Transportation Building,
Washington 6, D. C.

and that a copy thereof has likewise been transmitted by first-class mail to the Clerk of the District Court of the United States for the Western District of North Carolina (Asheville Division) at Asheville, N. C.

Dated at Washington 6, D. C., this 17th day of November, 1944.

.....

WILMER A. HILL,
Attorney for Appellant.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

Civil No. 507

CAROLINA SCENIC COACH LINES, A COPARTNERSHIP, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] dated July 21, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff's complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated October 13, 1943,

[1] The Court also made findings of fact and conclusions of law and rendered an opinion.

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under Section 207 of Part II of the Interstate Commerce Act (49 U. S. C. 307) granted the application of Smoky Mountain Stages, Inc.[2] (hereinafter referred to as Stages), a corporation with its principal office at Asheville, North Carolina, for a certificate of public convenience and necessity extending its authority as a common carrier of passengers by motor bus so as to authorize it to operate over a prescribed route between Clinton, South Carolina, and Augusta, Georgia, and to serve certain intermediate points. By the same order, the application of plaintiff, Carolina Scenic Coach Lines, hereinafter referred to as Scenic, for a certificate authorizing operation over the same route was denied.[3] An appeal was allowed on September 27, 1944.[4] Notwithstanding the provi-

[2] This company intervened as a defendant in the District Court.

[3] Scenic's general manager testified before the Commission that Scenic's application was simply filed for protection; and that Scenic did not believe that service over the proposed route was necessary, but wished to furnish such service rather than to permit Stages to do so if the Commission were of the view that service should be provided (Tr. 428, 430). It is evident from the complaint and the assignment of errors that plaintiff attacks only the granting of operating rights to Stages, and not the denial of such rights to plaintiff.

[4] Under 28 U. S. C. 47a an appeal in a case of this character must be taken within 60 days after the entry of final judgment or decree. Since the Court's decree here was entered on July 21, 1944, the appeal was not allowed within the 60-day period. However, the petition for appeal is stamped by the clerk of the District Court as having been filed on September 1, 1944, which date would be within the 60-day period.

sions of Rule 12, paragraph 2, of the Supreme Court Rules requiring service of certain appeal papers upon appellees within five days after the allowance of an appeal, such papers in the present case were not received by appellees until October 16, 1944, in a letter from the clerk of the District Court.

These two applications were referred by the Commission for hearing under Section 205 (a) of the Interstate Commerce Act (49 U. S. C. 305 (a))[1] to a Joint Board of two members, one from each of the States of South Carolina and Georgia, the States through which the proposed route ran. The Joint Board, after hearing, issued a report recommending that the application of Stages be granted and that of Scenic be denied. Thereafter the case was considered by Division 5 of the Commission, which wrote its own report, reaching the

[1] That Section, so far as pertinent, provides:

"The Commission shall, when operations of motor carriers * * * conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers * * * conducted or proposed to be conducted involve more than three States, refer to a Joint Board for appropriate proceedings thereon any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *. The Joint Board to which any such matter is referred shall be composed solely or one member from each State within which the motor-carrier * * * operations involved in such matter or are proposed to be conducted: * * *."

ultimate conclusion that public convenience and necessity required institution of the above-mentioned operations by Stages, but did not require the operations proposed by Scenic. Subsequently plantiff's petition for reconsideration was denied by the entire Commission.

The basis for the Commission's ultimate conclusion is apparent from the subordinate findings quoted in the Court's opinion. From these it appears that Stages is a member of National Trailways System. If the granting of Stages' application is approved, the last link in a chain of through motor-bus routes of Trailways' members between northern points and Florida will be completed. At present persons desiring to travel by bus between such points are virtually dependent upon Greyhound lines. Traffic originated by Trailways' members for Florida is now transferred at Charlotte, North Carolina, to the Atlantic Greyhound Corporation * (hereinafter called Greyhound), which completes the transportation south through the Jacksonville gateway. The routes of Trailways' members run through west coast Florida points, and with this link added, they will provide a more direct service to and from such points than that rendered by Greyhound through Jacksonville. There is need for another through north-south service, and any detriment which Greyhound might suffer by rea-

* Greyhound originally opposed the application of Stages but took no part in the District Court proceedings.

son of the establishment of another system of through routes is outweighed by the benefit to the public.

The Commission then proceeded to consider whether this need could be accomplished as well by Scenic and Carolina Stages, another bus line, over a through route presently maintained by them between Charlotte, North Carolina, and Augusta, Georgia, via Union, Newberry, and Saluda, South Carolina. In concluding that the best interests of the public would be served by granting Stages' application it pointed out that not until two weeks prior to the hearing herein had convenient connections and a more expeditious service been instituted over this through route between Charlotte and Augusta. It pointed out, too, that in the past the inability of Scenic and Carolina Stages and the National Trailways System to reach a satisfactory agreement as to the placing of these two carriers' routes in the Trailways' system appears to have been the delaying factor in the establishment of a through route between Charlotte and Augusta, and the cause of the filing of Stages' application. It further stated that the maintenance of a coordinated system of independent carriers, such as Trailways, required cooperation and friendly relations between the various members and that it was not indicated that future relations between Trailways, Scenic, and Carolina Stages would be more harmonious.

As to the competitive effect of this new through service, the Commission stated that while the granting of the application would bring Stages into a competitive situation with Scenic and Carolina Stages between Charlotte and Augusta, there was no showing that any substantial traffic was moving over the combined routes of Scenic and Carolina Stages between these points, and that it was apparent that relatively little, if any, Florida traffic was handled over such routes. It stated, too, that the new operations would bring Stages into competition with Scenic between Clinton, South Carolina, and Augusta, Georgia, the latter company operating between those points over a slightly different route from that sought by Stages. But it pointed out that there was no evidence as to the amount, if any, of through "bridge" traffic[7] which Scenic transported over this route or the number of passengers moving between points on this route and points beyond.

Finally, the Commission dealt with the need for and the effect of permitting local operations by Stages between Clinton, South Carolina, and Augusta, Georgia, and intermediate points on the proposed route, although pointing out that Stages anticipated most of its traffic over the route would be through "bridge" traffic. It found that while Scenic had long served most of the points on the

[7] "Bridge" traffic is traffic moving over this route having an origin above or below, and a destination beyond, the termini of this route.

proposed route, the latter route traversed 63.5 miles of highways not served by Scenic. It found, too, that persons located on a large portion of such highways had no direct service to or from Clinton, Charlotte, or Augusta; and that on 40.7 miles there was no bus service available. Also it stated that although Stages would, if this application were granted, compete with Scenic for the local traffic on this route, nevertheless, Scenic's interstate traffic between points on its route provided but a small portion of its revenue. It concluded that while a portion of such traffic might be diverted to Stages if the latter's applications were granted, any loss of traffic to Scenic would not be a sufficient reason for denying the application of Stages when consideration was given to the benefit to the public in having the through routes between New York City and Florida points and points intermediate thereto.

Plaintiff, as indicated in its jurisdictional statement, attacks the Commission's action principally on the following grounds: (1) that the Commission unlawfully referred the case for hearing to a Joint Board which was not properly constituted; (2) that the Commission erred in failing to find that there was no need for local service over the proposed route in addition to that now supplied by plaintiff or others; (3) that the Commission improperly found that public convenience and necessity required operation over the proposed route as a "bridge" route between the North At-

lantic States and Florida; (4) that the Commission failed to take proper cognizance of the adverse effect of the proposed new route on the existing operations of plaintiff; and (5) that the Commission failed to consider the physical condition of the proposed new route, particularly in relation to its contemplated use as a part of a regular north-south highway. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) Plaintiff attacks the reference of the case to a Joint Board composed of representatives of only South Carolina and Georgia, and urges that because Stages would draw passengers from many other States on this route, the Commission should have included representatives from these States on the Board or else heard the matter itself in the first instance. Section 205 (a) requires the Commission to refer an application for a certificate to a Joint Board when the "operations proposed to be conducted involve not more than three States," and authorizes it in its discretion to do so when such proposed operations involve more than three States. It further provides that the Joint Board "shall be composed solely of one member from each State within which the motor-carrier * * * operations involved * * * are or are proposed to be conducted." See footnote 5, *supra*. The language of this Section

plainly has reference to the States over whose highways[*] the operations proposed in the application would be physically conducted, here Georgia and South Carolina, and not to the States from which the traffic might perhaps be derived. Consequently, since operations in only these two States were involved, reference to a Joint Board of their representatives was mandatory. Furthermore, the States from which the traffic would originate would not generally be indicated in the application but could only be ascertained, even then only conjecturally, from the evidence subsequently introduced, and it has been recently recognized that the need for a Joint Board must be ascertained from the conditions indicated in the application rather than in the evidence. *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448, 450 (N. D. Cal.), affirmed, *per curiam*, No. 275 this Term, October 9, 1944. Moreover, as the District Court concluded, even if the reference to the Joint Board was improper, the appellant "not having made objection either before the Board or before the Commission, cannot now object to the

[*] The certificate provisions of the Act are obviously concerned with particular physical highway operations proposed in an application. Thus, Section 206 (a) (49 U. S. C. 306 (a)) forbids a common carrier by motor vehicle to "engage in any interstate or foreign operation on any public highway unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

reference" to the Joint Board.* In any event, as the District Court further pointed out, even if objection had been made and sustained, the result would have been merely to give the Commission discretion whether to refer the matter to a larger Joint Board for hearing or to hear it itself; and since the Commission heard the matter at large and filed an opinion giving its independent judgment, it is not possible to see how plaintiff was hurt by the hearing before the Board.

(2) As appears from the evidentiary findings made in the Commission's report, the Commission was perfectly justified in refusing to accept plaintiff's contention that there was no need for local passenger service over the proposed route in addition to that now supplied by plaintiff and others. Thus, the Commission found that while plaintiff had been operating between Clinton, South Carolina, and Augusta, Georgia, for a long period of time, serving most of the cities and towns on the proposed route, the latter route traverses 63.5 miles of highway not served by plaintiff. It

* Rule 87 of the Commission's Rules of Practice expressly provides that: "An objection not pressed in brief will be considered as waived"; and the point regarding reference to a Joint Board was not mentioned in plaintiff's brief or exceptions before the Commission. The District Court, in its finding of fact No. 4, found that "neither at the hearing before the Joint Board nor at the hearing before the Commission, did Carolina Scenic Coach Lines raise any objection to the reference to the Joint Board nor to the manner in which it had been constituted." See *Chicago, St. P., M. & O. Ry.* v. *United States*, 322 U. S. 1, 3–4.

found, too, that persons located on a large portion of such highways have no direct service to or from Clinton, Charlotte, or Augusta, and that on 40.7 miles there is no bus service available.

(3) The Commission's conclusion that public convenience and necessity required operations over the proposed route as a "bridge" route between northern points and Florida was likewise clearly justified. It found that the granting of the present application would forge the last link in a chain of National Trailways System through routes from the north to Florida, and thus enable Trailways members to provide competition for such through traffic with Greyhound, now a virtual monopolist in the territory involved here. It is well settled that the Commission may permit new service for the very purpose of giving the public the benefits of competition, as it did here. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 41–43; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 219 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944.

Furthermore, the Commission referred to the lack of harmony between plaintiff, Carolina Stages, and Trailways, which clearly indicated that the need for through Trailways service could better be met over Stages' route than by way of plaintiff's routes.

(4) Contrary to plaintiff's contention, it is also evident that the Commission did take due cognizance of the competitive effect of the proposed operations upon plaintiff's existing operations. As indicated above, the Commission carefully considered this question both with respect to plaintiff's through operations in concert with Carolina Stages between Charlotte, North Carolina, and Augusta, Georgia, and as to plaintiff's through and local operations between Clinton, South Carolina, and Augusta. It found that there was no showing that any substantial through traffic moved over either of these routes of plaintiff. As to the local traffic over the latter route, it found that plaintiff's interstate traffic moving to or from points on such route provided but a small part of its revenue, and that, while a portion of such traffic might be diverted to Stages if its application were granted, this factor was outweighed by the resulting public benefit."

(5) There is no indication that the Commission did not take into consideration the physical condition of Stages' proposed route, or that its condition was such as to justify denial of the application to operate over it. Plaintiff in its brief

[10] In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86, the Court said that "The Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices."

before the Commission pointed out that part of the route was over a four-mile stretch of rough clay road through a rural section, and that certain other parts of the highway were narrow, winding, and rough, having numerous railroad crossings and a one-way bridge. Presumably the Commission took into consideration these factors and concluded that they would not present an insurmountable obstacle to the service, as indicated by its basic finding that "applicant is fit, willing, and able properly to perform such service." While the report contains no discussion concerning the condition of the road, findings on that point were not of the basic or "quasi-jurisdictional" type, which are essential to the validity of Commission action. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 464–465. There is nothing in the record to show that this road was generally impassable. Plaintiff did not so consider it, since it sought permission from the Commission to operate over the route. Although apparently a small portion of the route was not over a good road, that portion was in a rural area, where, because of light traffic, the defects of the road were not likely to impair seriously Stages' proposed service. To compensate for the condition of the road it appears, too, as plaintiff's president admitted before the Commission (Tr. 440),

that the proposed route of Stages was two miles shorter than plaintiff's existing route between Clinton, South Carolina, and Augusta, Georgia.

The District Court properly held that the question of public convenience and necessity is one of those ultimate questions of fact entrusted to the expert judgment of the Commission, whose determination with respect thereto will not be disturbed if based upon a rational basis and substantial evidence. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 42; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 143–146; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944; *Kansas City and Leavenworth Transportation Co.* v. *United States,* 51 F. Supp. 916, 921 (D. Del.). It likewise properly held, applying this test, that "there can be no question but that * * * the order of the Commission was amply supported."

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 637

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR AFFIRM

WILLIAM A. ROBERTS,
JAMES E. WILSON,
R. G. CHERRY,
Counsel for Appellee, Smoky Mountain Stages, Inc.

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

Civil Action No. 507

CAROLINA SCENIC COACH LINES, A CO-PARTNERSHIP,
Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

MOTION TO DISMISS OR AFFIRM

Appellee, Smoky Mountain Stages, Inc., hereinafter referred to as Smoky Mountain, pursuant to Rule 12, paragraph 3, moves that the decree of the District Court be affirmed or dismissed.

This is a direct appeal from the final decree of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint to set aside an order of the Interstate Commerce Commission. Findings of fact, conclusions of law, and final decree were entered by the District Court on July 21, 1944.

The order allowing the appeal of appellant was signed by one of the judges constituting the three judge court on September 27, 1944. Title 28 U. S. C. 47(a) provides that appeals to the Supreme Court from a final decree or judgment of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court

be taken by the aggrieved party within sixty days after the entry of the final judgment or decree. Upon investigation appellee, Smoky Mountain Stages, Inc., has ascertained that appellant filed with the Clerk of the United States District Court for the Western District of North Carolina its petition for appeal to the Supreme Court on September 1, 1944. The presentation of the order allowing the appeal to the District Court was held in a state of suspense at the request of counsel for appellant pending final determination by its counsel as to whether they would perfect the appeal. The files of the District Court were examined on September 28, 1944, and it was discovered that there was no bond on appeal, supersedeas bond or citation or order allowing appeal. Upon later examination of the files of the Clerk of the District Court, it was ascertained that an order allowing appeal was signed by one of the District Judges on September 27, 1944, and that the Deputy Clerk had received oral instructions from one of appellant's counsel to present the order to the Court at the term commencing September 25th.

The filing of a petition for appeal on September 1, 1944, with instructions from appellant's counsel that the petition was to be held in a state of suspense in the clerk's office pending final determination as to whether the appeal would be perfected does not satisfy the requirements of 28 U. S. C. 47(a) requiring that the appeal be taken within sixty days after the entry of the final judgment or decree of the District Court. Under the circumstances, the filing of the petition for appeal is tantamount to no action with respect to compliance with the provisions of the United States Code referred to above.

In its October term, 1942, the Supreme Court amended its rules as follows:

> "An appeal will be out of time unless, within the period fixed by statute, application for allowance is

presented to the Judge or Justice who allows it. A prior timely application to another Judge or Justice does not extend the statutory period. See Matton Steamboat Company v. Murphy, 319 U. S. 412".

It seems clear that appellants have failed to comply with the provisions of the statute requiring the perfection of an appeal within sixty days from the date of the entry of the final order or decree. The appeal should be dismissed.

Washington counsel for appellant have not to date been served with a copy of the petition for and order allowing the appeal together with a copy of the assignments of error and of the statement required by Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States and a statement directing attention to the provisions of Paragraph 3 of Rule 12 of said Rules. Washington counsel for appellant are informed that counsel for the United States and for the Interstate Commerce Commission received copies of the petition for and the order allowing the appeal together with a copy of the assignment of errors and of the statement required by paragraph 1 of Rule 12 of the Rules and a statement directing attention to the provisions of paragraph 3 of the Rules on October 16, 1944. Appellee has accordingly violated paragraph 2 of Rule 12 of the Revised Rules of the Supreme Court of the United States in that it failed to serve the documents referred to therein upon appellee within five days after the allowance of the appeal by the District Court (the order was signed by the District Court on September 27, 1944 and the five day period as specified in Rule 12, Paragraph 2 expired October 2, 1944).

The Commission's order dated October 14, 1943, granted to Smoky Mountain a certificate of public convenience and necessity under 207 of Part II of the Interstate Commerce Act (49 U. S. C. 307) to operate as a common carrier by

motor vehicle of passengers, baggage, mail and newspapers over a described route between Clinton, South Carolina and Augusta, Georgia, and denied to Carolina Scenic Coach Lines, a co-partnership, hereinafter called appellant a certificate of public convenience and necessity over the same route.

In its application to the Commission, Smoky Mountain sought a certificate authorizing operation between Clinton, South Carolina and Augusta, Georgia via Chappell, South Carolina, and Saluda, South Carolina. The application, therefore, proposed operations to be conducted in two states and under Section 205(a) of Part II of the Act (49 U. S. C. 305(a), the Commission referred the application to a joint board composed of a member from each state for hearing. Appellant made no objection either before the joint board or before the Commission attacking the validity of the Commission's action in referring the application to a joint board for hearing.

On its merits, the Commission's report points out that the application of Smoky Mountain was designed to serve two purposes,—first, to provide local service at points along the proposed route not served by applicant or any other carrier and second, to provide a link for through service between New York and Florida points in connection with the Nationwide system of bus service rendered by the National Trailways System of which Smoky Mountain is a member. The Commission found that persons desiring to travel by bus between points along the eastern seaboard states and Florida are now virtually dependent upon the services of Greyhound. Traffic originated by Trailways member companies north of Charlotte, North Carolina is transferred at that point to Greyhound, which company transports the passenger to destination. On the return trip from Florida by Greyhound, the passenger is not re-

turned to Trailways' members at the point of the original interchange but such passenger is held on the Greyhound buses and carried to destination. Trailways' members participate in a portion of the southbound haul to Florida but due to the missing link in the through service its members are denied any part of the return traffic from Florida. In approving the application of Smoky Mountain the Commission found that:

> "The last missing link in a chain of through routes of Trailways' members between northern points and Florida will be completed."

The Commission further found that Trailways' members will be in a position to stimulate potential Florida traffic at points along their route and any detriment that Greyhound may suffer by reason of the establishment of another system of north-south service is out-weighed by the benefit to be derived by the public.

The Commission found also that appellant has operated between Clinton and Augusta for many years and together with another carrier (operated by Hamish Turner, a partner composing the partnership of appellant) has connecting routes available between Charlotte and Augusta via Union, Newberry and Saluda. Appellant and its associated carrier did not see fit to provide convenient connections and more expeditious service between Charlotte and Augusta until two weeks before the hearing on the application of Smoky Mountain. The Commission observed that Trailways is an association of independent carriers and the maintenance of coordinated service requires the cooperation and friendly relations between its various members. The inability of Trailways' members to induce appellant and its associate carrier to place their routes in the Trailways system delayed the establishment of the through route between Charlotte and Augusta and resulted in the

filing of the application of Smoky Mountain to provide that service. The Commission found that the public would benefit by having available the through routes between New York and Florida and that the best interest of the public will be served by granting the application of Smoky Mountain and denying the application of appellant. On these and other findings, the Commission made the ultimate finding that the present and future public convenience and necessity required operation by Smoky Mountain between Clinton and Augusta and that the present and future public convenience and necessity do not require the proposed operations of appellant and that its application should be denied.

Appellant made five principal contentions in the Court below:

(1) That the Commission erred in its failure to find that there is no need for "local passenger service over the proposed route in addition to that now adequately supplied by Scenic or by other operators already in the field;

(2) that the Commission erred in finding that public convenience and necessity require operation over the proposed route as a "bridge" route between North Atlantic States and Florida;

(3) that the Commission erred in its failure to take proper cognizance of the adverse effect of the proposed new operation on the existing operation of Scenic;

(4) that the Commission erred in failing to consider the condition of the proposed new route, particularly in relation to its contemplated use as part of a regular north-south highway; and

(5) that the Commission erred in deciding this case upon a record made before an improperly constituted joint board.

Points 1 through 4 clearly present questions as to the weight of evidence. Thus, appellant's contentions may be resolved into two divisions:

1. Was there substantial evidence to support the Commission's findings, and

2. Did the Commission improperly refuse to submit the application to an examiner for hearing and disposition?

The Court below found that the Commission had ample facts before it to support its order. It is elementary that the weight and credibility of the evidence is for the Commission and that its conclusions must be sustained if supported by substantial evidence. In the very recent case of *McLean Trucking Company* v. *United States*, 321 U. S. 67, 88, 64 S. Ct. 370, 381, Mr. Justice Rutledge said:

> "If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

The same rule was followed in *Interstate Commerce Commission* v. *Jersey City*, 64 S. Ct. 1129, 1139, Mr. Justice Jackson remarked that:

> "It is not for the Court to set aside without legislative command, its slow-wrought general principles which protect the finality and integrity of decisions of administrative tribunal".

This Court in *Western Chemical Company* v. *United States*, 271 U. S. 268, 270, said "to consider the weight of the evidence is beyond our providence".

It is well settled that administrative orders are presumed by the courts to be valid. See *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145, 59 S. Ct. 754, 83 L. Ed. 1147; *Helvering* v. *Clifford*, 209 U. S. 331, 336, 60 S. Ct.

554, 84 L. Ed. 301; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 64 S. Ct. 281; *Dobson* v. *Commissioner*, 320 U. S. 489, 64 S. Ct. 239.

In Virginia Stage Line v. *United States*, 48 Sup. 79, 83, the District Court in relying on several Supreme Court decisions said:

> "The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. Alton Railroad Company v. United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; Gray v. Powell, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' Board of Trade of Kansas City v. United States, 1942, 312 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432.
>
> "Accordingly, aware of our duty in the proper case to set aside an order of the Commission which is not supported by substantial evidence or which is clearly based on an error of law, we refuse to accept the allegations of Virginia Stage in place of the conclusions of the Commission, since we find no patent reversible error wherein the Commission has transgressed. United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971."

See also *Loving* v. *United States*, 310 U. S. 609 and cases cited therein.

Applicant's second contention is that the Commission erred in deciding this case upon a record made before an

improperly constituted joint board. Section 205(a) requires the Commission to submit certain matters involving operations in not more than three states to a joint board but does not require such submission when operations in more than three states are involved. Here the application related to operations in not more than three states and was accordingly referred to a joint board rather than to an examiner. The only issue, therefore, is whether the Commission is entitled to determine from the facts shown in the application whether the joint board or examiner procedure is required or whether it must postpone that determination and make it only from the facts as indicated by the proof. Smoky Mountain's application involved operations proposed to be conducted in not more than three states. The Commission referred it to a joint board for hearing. The proof was divided into two divisions, the need for service over the proposed route and the need for an all Trailways route between New York and Florida.

The Court below found that the case was properly referred to a joint board for hearing but even if this were not so, appellant could not raise an objection as it failed to object to the joint board procedure either before the board or the Commission. The Court below further found that reference to a joint board was not material as the Commission reviewed the facts and exercised its independent judgment in its report.

The assignment of an application for hearing under the provisions of Section 205(a) before a joint board or examiner now seems well settled. In the recent case of *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (motion to affirm granted and judgment affirmed by the United States Supreme Court on October 9, 1944) the United States District Court for the Northern District of

California in dismissing an action to set aside an order of the Commission stated:

> "In making the reference, the operation proposed by the applicant must necessarily be determined from the application rather than from the supporting evidence."

The Court quoted with approval the statement of the Commission that:

> "In the absence of any showing of any intentional deception or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more states, so that the number actually finally involved is less than originally appeared. Any other conclusion would tend to uncertainty and confusion. In innumerable hearings, jurisdictional issues, requiring final determination before proceeding, would arise as to whether or not there had been a failure of proof as to a particular state."

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed or in the alternative the appeal should be dismissed.

WILLIAM A. ROBERTS,
JAMES E. WILSON,
R. G. CHERRY,
Counsel for Smoky Mountain Stages, Inc.

October 30, 1944.

I hereby certify that I have this 30th day of October, 1944 served a copy of the foregoing motion to dismiss or affirm on counsel for appellant and on counsel for the United States of America and the Interstate Commerce Commission.

JAMES E. WILSON.

No. 637. CAROLINA SCENIC COACH LINES *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Western District of North Carolina. December 11, 1944. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. (1) *North*

Coast Transportation Co. v. *United States*, *ante*, p. 668; (2) *Chesapeake & Ohio R. Co.* v. *United States*, 283 U. S. 35, 41–43; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464–5; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, 158; *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503, 512–13; (3) *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86. *Mr. Wilmer A. Hill* for appellant. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for the United States et al., and *Messrs. William A. Roberts* and *James E. Wilson* for the Smoky Mountain Stages, respondents. Reported below: 56 F. Supp. 801.